

VII. REGULATION OF OTHER TERMS AND CONDITIONS

53. Prior to OBRA, Section 332 prohibited the states from imposing “rate ... regulation” upon certain wireless telecommunications carriers.¹¹⁶ This prohibition was construed broadly to preclude almost all state regulatory activity.¹¹⁷ As revised by OBRA, Section 332(c)(3) now prohibits states from regulating “the rates charged” for CMRS, but it expressly reserves to them the authority to regulate the “other terms and conditions of commercial mobile services.” Although there is no definition of the term “the rates charged” in the statute or its legislative history, there is legislative history regarding the “other terms and conditions” language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the HPUC is entitled to continue, despite our denial of its Petition.

54. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:¹¹⁸

¹¹⁶ The statute provided in relevant part that “[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service” 47 U.S.C. § 332(c)(3)(prior to revisions enacted by OBRA).

¹¹⁷ *See, e.g.,* Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission’s interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.,* American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)(“Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier.”), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) (“state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute [A]ccompanying legislative history reveals that Congress recognized the Commission’s broad discretion to dictate which land mobile systems are to be regulated as private.”). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission’s Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990):

If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

¹¹⁸ H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 261.

By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state’s lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”

55. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the HPUC Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

56. First, although the HPUC may not prescribe, set, or fix rates in the future because it has lost authority to regulate “the rates charged” for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.¹¹⁹ In consequence, it is conceivable that matters might arise under state complaint procedures that relate to “customer billing information and practices and billing disputes and other consumer matters.” We view the statutory “other terms and conditions” language as sufficiently flexible to permit Hawaii to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

57. Second, under the same logic, we also conclude generally that several other aspects of a state’s existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state’s traditional authority to monitor commercial activities within its borders. Put another way, we believe Hawaii retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state.¹²⁰ We expect that, to

¹¹⁹ *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person “complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof.” 47 U.S.C. § 208(a) (emphasis added).

¹²⁰ We remind Hawaii that the certification process contemplated by its proposed general order is precluded by the provision in amended Section 332 that categorically preempts state and local entry regulation, and the statute makes no provision for continuance or extension of this authority by this Commission. As of the effective date of the amendment, therefore, Hawaii’s certification jurisdiction

the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the Hawaii regulatory practice at issue.

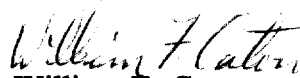
VIII. ORDERING CLAUSES

58. Accordingly, pursuant to Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. § 332(c)(3)(B), **IT IS ORDERED** that the Petition for Authority To Extend Rate Regulation of Commercial Mobile Radio Services, filed by the Public Utilities Commission, State of Hawaii, **IS DENIED** for the reasons set forth above.

59. **IT IS FURTHER ORDERED** that the motion for acceptance of supplemental reply comments, filed October 19, 1994 by Mobile Telecommunications Technologies Corp., **IS GRANTED**.

60. **IT IS FURTHER ORDERED**, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order **SHALL BE FILED** within thirty days of the day after the day on which public notice of this action is given.¹²¹

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

over commercial mobile radio service was terminated. *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261.

¹²¹ Although we assigned the HPUC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

APPENDIX A

PR Docket No. 94-103 (Hawaii)

Parties Filing Comments or Oppositions to Hawaii Petition

AMSC Subsidiary Corporation in Response to Various State Petitions to Regulate Rates of CMRS Providers

American Mobile Telecommunications Association, Inc.

BellSouth Corp.

Cellular Telecommunications Industry Assoc.

E.F. Johnson Co.

GTE Service Corp. on behalf of GTE Mobilnet of Hawaii Inc. and GTE Hawaiian Telephone Company Inc.

McCaw Cellular Communications, Inc.

Mobile Telecommunications Technologies Corp.

National Cellular Resellers Assoc.

Paging Network, Inc. on Petitions by State Authorities to Continue Regulation of CMRS Rates

Nextel Communications, Inc.

Personal Communications Industry Assoc.

Parties Filing Replies

Cellular Telecommunications Industry Association

GTE Service Corporation

McCaw Cellular Communications, Inc.

PageMart, Inc.

Rural Cellular Association

Supplemental Reply Comments of Mobile Telecommunication Technologies Corp.

APPENDIX B

After-Tax Rates of Return in Hawaii

Company-Market	1989	1990	1991	1992	1993
GTE Mobilnet, Inc. - Hilo	NA	NA	5.10%	-10.06%	-12.20%
GTE Mobilnet, Inc. - Maui	NA	NA	22.82%	1.01%	3.93%
GTE Mobilnet, Inc. - Oahu	NA	NA	-18.40%	-2.25%	8.55%
GTE Mobilnet, Inc. - Kauai	NA	NA	6.87%	-8.78%	-4.79%
USCOC of Hawaii 3, Inc - Island of Hawaii	NA	NA	-22.76%	-4.20%	2.59%
Maui Cellular Telephone Co. - Maui	NA	NA	NA	NA	-10.11%
Honolulu Cellular Company - Oahu	8.95%	12.53%	24.14%	43.12%	43.73%
Cybertel Cellular - Kauai	NA	NA	-28.66%	5.45%	36.97%
Average After-Tax (Weighted By Average Net Plant and Equipment)				14.15%	19.64%

Sources: PR Docket No. 94-103, Petition of Public Utilities Commission, State of Hawaii, For Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, filed Aug. 8, 1994, EXHIBIT A-1. Hawaii provided pre-tax rates of return. The effective tax-rate used for this table is 38.22% (34% Federal, 6.4% State).

APPENDIX C

Increase Net Plant in Hawaii

Company-Market	1989	1990	1991	1992	1993
GTE Mobilnet, Inc. - Hilo	NA	NA	1345	2468	2714
GTE Mobilnet, Inc. - Maui	NA	NA	1497	3165	3113
GTE Mobilnet, Inc. - Oahu	NA	NA	10,796	14,148	18,790
GTE Mobilnet, Inc. - Kauai	NA	NA	845	2821	3753
USCOC of Hawaii 3, Inc - Island of Hawaii	NA	NA	2173	2283	3315
Maui Cellular Telephone Co. - Maui	NA	NA	NA	NA	214
Honolulu Cellular Company - Oahu	11,599	15,155	20,067	18,505	18,719
Cybertel Cellular - Kauai	NA	NA	2449	2808	2659
Total Plant and Equipment	NA	NA	39,172	46,198	53,277
Annual Growth				18%	15%

Source: PR Docket No. 94-103, Petition of Public Utilities Commission, State of Hawaii, For Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, filed Aug. 8, 1994, EXHIBITS A-1, A-2, A-3, A-4 and A-5.